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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

NO. ___

EARNEST JACKSON, JR.,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review the segment of the judgment of the United States Court of Appeals for the Fifth Circuit entered in this case that affirmed petitioner's conviction in the District Court for the Northern District of Alabama on a charge of conspiracy to distribute heroin, in violation of 21 U.S.C. §846.

OPINIONS OF THE COURTS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 588 F.2d 1040 (5th Cir. 1979) and is set forth in the Appendix, infra, p. 59 . No opinion was reported in the District Court.

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The judgment of the Court of Appeals was rendered on February 2, 1979 (Appendix "B", infra, p. 59). Petitioner seasonably filed a petition for rehearing en banc. On March 7, 1979, the court below denied the petition for rehearing. Appendix, infra, p. 58.

This petition seeks review of the judgment of a United States Court of Appeals in a criminal case. This Court has jurisdiction to grant this petition under 28 U.S.C. §1254(1).

STATEMENT OF QUESTIONS INVOLVED

I.

Whether the intentional and surreptitious eavesdropping on petitioner's conversation, by agents and police who occuped an adjoining hotel room for that precise purpose, under the facts here, violated his fundamental Fourth Amendment right to privacy?

II.

Whether an accused is entitled to bolster his credibility by producing evidence showing that his reputation for truth and veracity is good?

III.

Whether the due process and fair trial rights of a defendant are offended where the prosecutor elicits highly prejudicial testimony which has absolutely no probative value?

IV.

Whether the hearsay rule and the accused's right of confrontation can be circumvented so as to allow the parrotting of statements attributed to unidentified, and unidentifiable, third parties?

V.

Whether the trial court erred in denying the petitioner's motion for judgment of acquittal, made at the close of the Government's case, and renewed at the close of all the evidence and post-verdict?

CONSTITUTIONAL AND STATUTORY PROVISIONS WHICH THE CASE INVOLVES

United States Constitution:

Amendment IV:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized."

Amendment VI:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

21 United States Code:

§841(a)(1):

"Except as authorized by this title, it shall be unlawful for any person knowingly or intentionally--

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance[.]"

§846:

"Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy."

STATEMENT OF THE CASE [1]

I. History of the Case

The petitioner, Earnest Jackson, Jr. was convicted in the United States District Court (for the Northern District of Alabama) following a jury trial presided over by Chief Judge Frank H. McFadden. The indictment charged Jackson and James Porter (his co-defendant at the trial) as having conspired, in violation of 21 U.S.C. §846, to distribute heroin. And, it charged them with possession with intent to distribute heroin in violation of 21 U.S.C. §841(a).

On appeal, a panel of the Fifth Circuit Court of Appeals, while affirming both Jackson's and Porter's convictions for conspiracy, reversed their conviction for possession--the sole substantive offense charged in the indictment. The effect of this determination is that Jackson's original sentence, which aggregated twenty-seven (27) years, would be reduced to twelve (12) years, and his fine reduced from $40,000 to that of $15,000.

1/ References to the Appendix to the Appellate Court Brief are designated (App., p. ..). References to the Transcript of Proceedings in the District Court are designated in this Petition as (Tr., p. ..).

II. Statement of Facts

(1)

The indictment herein charged that Jackson (the petitioner) and Porter conspired to distribute approximately 934.5 grams of heroin, and it charged that Jackson and Porter possessed, with intent to distribute and dispense, the same 934.5 grams of heroin.

The evidence disclosed that on or about June, 1977, Linda Johnson (hereinafter Johnson) had an occasion to meet Porter in Los Angeles, California. Thereafter, Johnson traveled from Los Angeles to Birmingham, Alabama on July 7, 1977, transporting the heroin laden bag. She was met at the airport by Porter.

Prior to July 7, Jackson and Miss Beverly Pertilla checked into the Kahler Plaza Hotel, Room 312, on July 4, 1977. Thereafter, Drug Enforcement Administration Special Agent Hahn established a "command post" in Room 314 adjacent to Jackson's room for the admitted purpose of eavesdropping on Jackson's conversations. On the morning of July 7, 1977, Porter and Jackson traveled to the Birmingham Municipal Airport and were subsequently arrested therein.

Special Agent Larry Hahn, based upon his eavesdropping, had obtained search warrants dated July 7 and July 8 relating to a certain unclaimed suitcase at the airport and Room 312 of Kahler Plaza Hotel respectively.

Neither Jackson nor Porter claimed the suitcase or otherwise had it in their actual or constructive possession. The suitcase was ultimately seized by Drug Enforcement Administration Agents from the unclaimed baggage area of Birmingham Municipal Airport.

Jackson filed a variety of pretrial motions. These included a Motion to Suppress. This motion specified as grounds therefor, inter alia:

1. The warrants issued by the United States Magistrate separately and severally were issued upon affidavits insufficient as a matter of law.

2. The search warrants were invalid and improperly issued in each instance.

3. Statements contained in the affidavits relating to things done and matters alleged to be factual were mere conclusions premised upon speculation, hearsay, and illegal evidence unlawfully and unconstitutionally obtained.

Apparent from the face of the two Affidavits precipitating the search of a suitcase on July 7, 1977 and the search of the hotel room on July 8, 1977, and the Suppression Hearing Transcript (Tr., pp. 3-223); certain factual matters are clear beyond dispute.

Special Agent Larry Hahn (hereinafter Hahn) of the Drug Enforcement Administration (hereinafter DEA) had been investigating Jackson for a period of time exceeding three years (Tr., p. 17). Throughout said investigation, including numerous surveillances of Jackson's conduct and activities, neither Hahn nor any other DEA agent had ever observed Jackson in possession of, receiving, giving, passing heroin or otherwise trafficking in narcotics (Tr., pp. 18-19).

Moreover, prior to the surveillance of July 6-7, 1977, and prior to the arrest of Jackson and Porter and seizure of heroin on July 7, 1977, the DEA had no information that a shipment of contraband was, in fact, arriving in Birmingham in the morning hours of July 7, 1977 (Tr., p. 29).

All pertinent and verifiable information relating to the charges in this case transpired between July 5, 1977 and July 8, 1977. These are the dates Jackson and an unidentified, at that time, female checked into Birmingham's Kahler Plaza Hotel, and the search of Jackson's room therein-Room No. 312, respectively. No significant leads were developed until July 6, 1977, when Hahn and other agents rented a room at Kahler Plaza. This room was directly adjacent to Jackson's room, from which they supposedly heard conversations occurring therein underneath the doors connecting the rooms. The substance of overheard conversations are contained in the Search Warrant Affidavits dated July 7,

and 8, 1977.

It is readily apparent that if the conversations, and information gained therefrom, were excised from the Affidavits, not even a shred of probable cause would exist.

Hahn's reason for selecting the room adjacent to their target, Jackson, was emphatically stated as follows:

> "Well, we entered that room more or less as a command post, because it was, it was an adjoining room and it was close to--we were able to hear people coming in and out of the room and so forth. Of course, once we were in there, we could, we determined that we would overhear conversations through the door." (Tr., p. 20 [emphasis added].)

But even this is not all. This witness emphasized the complaint here being made to this Court, by testifying further that, "[w]e listened by putting our ear to the crack at the bottom of the door" (Tr., p. 39), an eavesdropping position that permitted them to willfully intercept and monitor even indications of sexual activity that took place in this room (Tr., p. 45) The fact that this occurred without any attempt at even token minimization is surely an aspect of this issue.

In further describing the officers' surveillance procedure, Sergeant Trucks testified, he "put a pillow on the floor

next to the door... with his ear against the door" (Tr., p. 205). As put by Trucks, he was "able to overhear as he lay [on the floor] with his ear pushed against the crack in the door" (Tr., p. 195).

(2)

Through its first witness, Beverly Pertilla, the Government intentionally, and in our judgment with calculated design, elicited improper testimony. The petitioner contends that inasmuch as this highly prejudicial evidence lacked any probative value, it formed a sufficient basis for a mistrial--a motion for which was denied. The Court of Appeals, while crediting our contention that these questions were prejudicial, sacrificed Jackson by classifying the error as harmless.

(3)

Next, through the testimony of Government witness Linda Johnson, the person who transported a suitcase from Los Angeles, California to Birmingham, Alabama, unknowing the same to contain heroin, the Government was permitted to victimize Jackson by the use of some highly prejudicial hearsay statements. These statements were obviously designed to "tie" Jackson to the heroin laden suitcase through his co-defendant, Porter.

The pertinent hearsay testimony in issue here is reflected in the following excerpt of the Transcript:

Q (Government) When did you next hear the name Jackson mentioned relative to a trip to Alabama?

A You mean, before I came here, when did I hear?

Q Yes, ma'am.

A A lady came by.

* * *

Q What, if anything, did she tell you to do, with respect to the bag that she gave you?

A She told me to pack it, you know, and I did.

Q When did she tell you to take a flight to Birmingham, if she did?

MR. SHEFFIELD: Your Honor, I would like to interpose an objection, the conversation -- would you like for me to approach the bench?

THE COURT: Just state the grounds of your objection and if we need to --

MR. SHEFFIELD: Third party conversations outside the presence of any of the two defendants. This individual is not named in the indictment as a co-conspirator.

THE COURT: Overruled.

Q Do you know who this person was?

A I didn't know her.

Q Had you ever seen her before?

A No.

Q Do you have a recollection of what her name was?

A Doris or Dorothy. I just saw her briefly.

Q Do you know what her last name was?

A No.

Q Did the lady who gave you -- Dorothy or Doris, who gave you the money, tell you who you would be met in Birmingham by?

MR. SALTER: Same objection, Your Honor.

THE COURT: Overruled.

Q Were you told who would meet you?

A She told me that James Arthur would pick me up at the airport.

(Tr., pp. 386-388).

It could not be clearer the statements attributed by this Government

witness to some unidentified black female were hearsay of the rankest sort. For obviously, there was no showing that this so-called "Doris or Dorothy" had any guilty knowledge, or that she otherwise qualified as a conspirator, so as to impute her statements, if made, through Porter to Jackson. In addition, the admission of this evidence violated Jackson's Sixth Amendment right of confrontation.

(4)

During the trial of this cause, the petitioner elected to testify in his own defense. He specifically refuted the allegations of the indictment (Tr., pp. 804-881). Additionally, he emphatically disputed numerous segments of the testimony rendered by the prosecution's chief, and essential, witness. Thereafter, Jackson called as a witness in his behalf one Rubin Davis. Jackson's trial attorney asked the following question (Tr., p. 883):

> Q At the time and under the circumstances and way that you have come to know Earnest Jackson, Jr., <u>have you come to form an opinion as to his character for truthfulness and veracity?</u> (Emphasis added.)

The following colloquy ensued between counsel and the court (Tr., pp. 883-888):

A I would have no reason to --

THE COURT: Now, just a minute.

Q Have you come to form an opinion?

A Yes, sir.

Q And what is that opinion?

A My opinion that he is --

MR. BARNETT: We object to this and ask to approach the bench.

THE COURT: Yes, sir.

MR. BARNETT: Apparently counsel has asked the question to support his character with reference to truth and veracity which has not been placed in attack by the United States Government by the indictment. The indictment doesn't put that trait or any character trait in question in the case before the Court.

THE COURT: Truthfulness is not an issue in the lawsuit. <u>The Government has not put his character in issue</u>.

I will sustain the objection.

(Emphasis added.)

ARGUMENTS RELIED ON FOR ALLOWANCE OF WRIT

I

The Intentional And Surreptitious Eavesdropping On Petitioner's Conversations By Agents and Police Who Occupied an Adjoining Hotel Room For That Precise Purpose, Under The Facts Here, Violated His Fundamental Fourth Amendment Right To Privacy.

The intentional and surreptitious listening to Jackson's conversations by Special (DEA) Agent Larry Hahn, while specifically stationed in an adjacent hotel room expressly for that purpose, was a clear, overt violation of Jackson's constitutional right to privacy. See Katz v. United States, 389 U.S. 347 (1967).

In Katz, this Court directed its attention to an aspect of the precise issues raised herein. In reversing Katz' conviction, the Court, in essence, held that: the government's activities in listening (in that case, electronically) to and recording Katz' words, spoken in a public telephone booth, violated his justified expectation of privacy. Such eavesdropping, it was said, amounted to a "search and seizure" within the Fourth Amendment. The lack of "penetration" of the booth by the tools used was deemed immaterial since the "Fourth Amendment protects people, not

places." In our view, the upshot of of Katz is that the eavesdropping without prior judicial sanction, approval and attendant safeguards, violates constitutional standards. If this is so, it should follow that these agents were required to obtain court authorization to engage in the type of intrusion involved in this case.

Stated another way, the sanctity of privacy underlying the Court's decision in Katz, supra, along with an apparent concern for attendant constitutional safeguards (e.g., prior authorization, restraint, etc.) embodied and represented in that part of Title III Omnibus Crime Control and Safe Streets Act of 1968, commonly known as the Federal Wiretapping Statutes, 18 U.S.C. §§2510-2520 should mandate this result.

While in the case at bar there were no electrical devices used, or mechanical recordations made of Earnest Jackson, Jr.'s conversations, it is certainly clear he had a reasonable and justified expectation of privacy with reference to the telephone and other conversations overheard as a direct consequence of the willful design by these Government agents. More simply put, their purpose was "investigation" and "surveillance" of Earnest Jackson. To this end, they specifically turned an adjacent hotel room into a "command post" for their investigation and surveillance activities. Not only this, a substantially contemporaneous memorandum of the conversations supposedly overheard is contained in the two pertinent Affidavits for Search Warrant herein. Many are

identified as specific quotations of statements made by Jackson.

Obviously then, without these conversations and "fruits", there is no probable cause on the face of the Affidavits. It is equally clear that there was no prior impartial and detached determination as to the propriety of, or authority to use, the methods herein being assailed. Nor was there sufficient, if any, minimization during the eavesdropping itself. Rather, the methods exploited here were simply the result of an arbitrary decision by a Government investigative unit in a general surveillance investigation. This is so despite the fact, as the Transcript reveals, there was a complete lack of any information, from any source, that Jackson's presence in the Kahler Plaza Hotel was related to drug trafficking. Simply put then, the agents merely singled out the petitioners because of their longstanding suspicions.

In our view, a number of this Court's holdings in Katz appear applicable and dispositive to the issues herein. Here, reference is made to the following specific tenets:

> "[T]he Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his home or office, is not a subject of Fourth Amendment protection (citations omitted). But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected (citations omitted). 389 U.S. at 351-352.

* * *

> One who occupies [a phone booth], shuts the door behind him, and pays the toll that permits him to place a call is surely entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world. 389 U.S. at 352.

* * *

> ....[O]nce it is recognized that the Fourth Amendment protects people - and not simply "areas" - against unreasonable searches and seizures, it becomes clear that the reach of the Fourth Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure. 389 U.S. at 353.

* * *

> The Government urges that because its agents relied upon the decisions in (citations omitted), and because they did no more than they might properly have done with prior judicial sanction, we should retroactively validate their conduct. That we cannot do. It is apparent that the agents in this case acted with restraint, yet the inescapable fact is that this restraint was imposed by the agents themselves, not by a judicial officer. 389 U.S. at 356.

* * *

....Searches conducted without warrants have been held unlawful "notwithstanding facts unquestionably showing probable cause" (citation omitted), for the Constitution requires "that the mandate of the [Fourth] Amendment requires adherence to judicial process" (citation omitted), and that searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment--subject only to a few specifically established and well-delineated exceptions.

* * *

It is difficult to imagine how any of those exceptions could ever apply to the sort of search and seizure involved in this case. 389 U.S. at 357." (Emphasis supplied.)

This brings us to the statutory procedure permitting electronic surveillance precipitated by Katz. Here, even a casual review of 18 U.S.C. §§2510-2520 shows these enactments were designed to insure that adequate constitutional safeguards be employed before there is any invasion into the privacy of private conversations. While these statutes specifically relate to the interceptions by means of electrical or mechanical devices, the spirit and thrust of Katz is clearly manifested.

Obviously, the requirements that there be judicial intervention, minimization, and exhaustion of other reason-

able investigative measures indicating the need for such extreme invasions of privacy clearly comports with axiomatic principles of constitutional law--none of which were vindicated by the eavesdroppers in the case at bar.

We are not here presented with a misplaced trust on the part of Jackson, as in the circumstances when a defendant makes damning statements to a cooperating co-defendant, e.g., United States v. Hickman, 426 F.2d 515 (7th Cir. 1970); a "victim", e.g., United States v. DeLutro, 435 F.2d 255 (2d Cir. 1970); or an undercover agent, e.g., United States v. Caracci, 446 F.2d 173 (5th Cir. 1971). Rather, he believed and had a justifiable expectation for privacy in the hotel room he had secured as to all matters occurring therein. The spirit and principles of the Fourth Amendment, as explicated and construed in Katz, governs all governmental invasions of privacy, particularly oral conversations. This being so, they demand protection from abuse such as is present here.

Prior to Jackson, no Fifth Circuit case presenting facts reasonably comparable to those in this case had been decided. On the other hand, United States v. Fisch, 474 F.2d 1071 (9th Cir.) cert. denied, 412 U.S. 921 (1973) and United States v. Kim, 415 F.Supp. 1252 (D.C. Hawaii, 1976) both dealt specifically with the type of eavesdropping here involved. Also see United States v. Choate, 422 F.Supp. 261 (C.D.Cal. 1976).

In Fisch, as was the case here, federal agents mechanically arranged to

locate themselves in a hotel room adjoining the defendants, for the sole purpose of listening in on their conversations. After noting, as was the case here, that there was no bugging by electronic means and no trespassing involved (see United States v. Carriger, 541 F.2d 545 [6th Cir. 1976]); the Ninth Circuit postured its decision on a determination as to whether (under Katz) the speaker had "'justifiably relied' on his privacy" (474 F.2d, at 1076), and whether his subjective expectations of privacy were "justifiable, 'one that society is prepared to recognize as reasonable'" (474 F.2d, at 1077).

While the court found the statements in Fisch failed in both of these particulars, it is important to note the court fully credited a circumstance not present here--that is, that the critical conversation was audible enough to be heard by one sitting "on the bed in the middle of the room" (ibid). Obviously then, it was for this reason the Fisch court determined that, on balance, "[t]here ha[d] been no justifiable reliance" on any right of privacy (id., at 1078).

As to United States v. Kim, supra, the court there was concerned with a situation where, as was the case here, there was no trespass upon private property. More specifically, the court viewed peering into one's home in quest of evidence to be a violation of privacy. What is even more significant to this case, the court in Kim recognized that "[a]fter Katz, the concept of curtilage and the presence or absence of a physical

intrusion can have 'no constitutional significance' in determining whether or not a search has taken place" (415 F. Supp., at 1255). But even this is not all. The court further determined that Kim's "subjective expectations of privacy" were not forfeited because "he did not draw his curtains and also because he himself used binoculars from his own window, allegedly to determine if he was under surveillance." Id., at 1256.

Distilled, Katz (as it now stands) expands the concepts of "protected areas" by bringing within the ambit of Fourth Amendment control any surveillance by law enforcement officers that offends an individual's "reasonable expectation of freedom from governmental intrusion," Mancusi v. Deforte, 392 U.S. 364, 368 (1968), even in public areas. Cf, Bielicki v. Superior Court, 57 Cal. 2d 602, 371 P.2d 288 (1962) (an occupied public lavatory cabinet).

Viewed in this light, the point being urged here is that if the Fourth "Amendment... [still] affords protection against the uninvited ear" (Alderman v. United States, 394 U.S. 171 [1969]), where (as here) it is shown that the "uninvited ear" is purposely engineered into "protected areas"--that is, into an area where such intrusion is justifiably not expected--such an act should be deemed impermissible. Indeed, if it were otherwise, there seemingly would be no way to justify other holdings by this Court in certain significant non-electronic, non-trespassory surveillance cases. Here, emphasis is being given to the Court's reference to Katz's legiti-

mate expectation of privacy formulation in Mancusi v. Deforte, 392 U.S. 364, 368 (1968); Combs v. United States, 408 U.S. 224, 227 (1972) and Couch v. United States, 409 U.S. 165, 171 (1969). Also see, Regalado v. California, 374 U.S. 497 (1963) and Texas v. Gonzales, 388 F.2d 145 (5th Cir. 1968). (In Regalado, decided prior to Katz, the Fifth Circuit viewed surveillance through peepholes drilled in a hotel door, apparently a collaborative effort of the police and the hotel management, as a Fourth Amendment search. Gonzales, which interestingly enough was decided by the same court, subsequent to Katz, seemingly would limit the "plain view aspect of these situations to those things that are indiscriminately exposed to public scrutiny.)

Petitioner finally directs the Court's attention to United States v. United States District Court, 407 U.S. 297, 316-317 (1972). Here, it was stressed that:

> "...Fourth Amendment freedoms cannot properly be guaranteed if... surveillances may be conducted solely within the discretion of the Executive Branch. The Fourth Amendment does not contemplate the executive officers of Government as neutral and disinterested magistrates. Their duty and responsibility are to enforce the laws, to investigate, and to prosecute. Katz v. United States, supra, at 359-360, 88 S.Ct. at 515-516 (Douglas, J., concurring). But those charged with this investigative and prosecutorial duty should not be the sole judges of when to utilize constitutionally sensitive means in pursuing their tasks. The historical judgment, which the Fourth Amendment accepts, is that unreviewed executive discretion may yield too readily to pressures to obtain incriminating evidence and overlook potential invasions of privacy and protected speech." Id., at 316-317.

Despite the efficacy of the above reasoning patterns, the Fifth Circuit was unpersuaded. The position it took was that Jackson and his female guest could not possibly have had any "justifiable expectation of privacy with respect to their motel room conversations which were audible to the unaided ears of the Government agents lawfully occupying an adjoining room." Jackson, 588 F.2d, at 1051. As they saw it, our objections to the seizure of these conversations could be resolved on the basis of a "plain view" type analysis. Id., at 1051-1052. But even this is not all. The court expressly refused to credit as a relevant consideration the fact that these officers willfully sought to eavesdrop: a fact which they could only accomplish, with any real hope of success, by actually laying on the floor with their ear almost literally at the crack between the bottom of the door and the floor.

In our judgment, this type of conduct by agents of our Government ought not be resolved on a Machiavellian thesis as was so obviously done here.

II

An Accused Is Entitled To Bolster His Credibility By Producing Evidence Showing That His Reputation For Truth And Veracity Is Good.

It is too well-settled to require citation of authority that an accused's character, disposition and reputation may not be put in issue in the prosecutions case-in-chief. "The overriding policy of excluding such evidence... is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice." Michelson v. United States, 335 U.S. 469, 69 S.Ct. 213, 218 (1948). The pronouncements of Michelson remain untarnished by subsequent decisions and are directly applicable herein.

Michelson firmly establishes the absolute right of a defendant to place his "character" in issue. Here, it was stated:

> "But this line of inquiry firmly denied to the State is opened to the defendant because character is relevant in resolving probabilities of guilt. He may introduce affirmative testimony that the general estimate of his character is so favorable that the jury may infer that he would not be likely to commit the offense charged. This privilege is sometimes valuable to a defendant for this Court has held

> that such testimony alone, in some circumstances, may be enough to raise a reasonable doubt of guilt and that in the federal courts a jury in a proper case should be so instructed. (335 U.S., at 476.)
>
> * * *
>
> The good character which the defendant had sought to establish was broader than the crime charged and included the traits of 'honesty and truthfulness' and 'being a law-abiding citizen.' Possession of these characteristics would seem as incompatible with offering a bribe to a revenue agent as with receiving stolen goods. The crimes may be unlike, but both alike proceed from the same defects of character which the witnesses said this defendant was reputed not to exhibit." (335 U.S., at 483 [emphasis supplied].)

As hereinbefore mentioned, Jackson elected to take the stand and testify in his own behalf. By doing so, he "threw open the door of the entire subject which the law has kept closed for his benefit." Michelson, supra, at 479. His cross-examination (Tr., pp. 840-878), by the Government, was replete with questions designed to attack the truth of his personal testimony or, in other words, his veracity. Jackson's right, as enunciated in Michelson, to call witnesses attesting to his reputation for truthfulness and veracity was improvidently curtailed.

The trial court cited Rules 404 and 608 of the Federal Rules of Evidence as the basis for his decision (Tr., pp. 883-888).

As to this, it is here contended the court's reliance upon Rule 404 was sorely misplaced. To begin with, Rule 404 specifically provides:

> "(a) Character Evidence Generally.
>
> Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except:
>
> (1) Character Of Accused.
>
> Evidence of a pertinent trait of his character offered by an accused or by the prosecution to rebut the same."

Viewed in its proper light, the proffered testimony was not offered to prove Jackson's propensities vel non to commit a crime. On the contrary, the testimony was offered to refute the very substantial damage to his credibility suffered from the Government's scathing attack upon his veracity and credibility.

We start here with the idea that Rule 404(a)(1), Federal Rules of Evidence, makes it clear that an accused can surely offer evidence of any "pertinent trait of his character." This being so, it flies in face of this express language to say, as the trial court did here, that such evidence would only be proper if "[T]he

Government... put his character in issue" (Tr., p. 883).

While it is certainly true that character testimony is only admissible when pertinent to some specific issue, which limits such evidence to that issue; it is equally apparent that the accused can always put his character in issue. See, 2 Wright, Federal Practice and Procedure, §409, at p. 116 (1969).

This must surely be so if it can still be said that character evidence must be considered along with all of the other evidence in the case in deciding if the accused has been shown to be guilty beyond a reasonable doubt. United States v. Crosby, 294 F.2d 928, 948 (2d Cir. 1961), cert. denied 368 U.S. 984 (1962). The same is true of an accused's entitlement to the instruction that evidence of good character alone may raise a reasonable doubt as to guilt. See, Michelson v. United States, 335 U.S. 469, 476 (1948) and United States v. Shimon, 352 F.2d 449, 453 (D.C. Cir. 1965), cited with approval in United States v. Lechoco, 542 F.2d 84, 88 (D.C. Cir. 1976).

United States v. Lechoco, cited above, is most relevant here, since it dealt specifically with Rule 404(a)(1). So is its express reliance on the position taken by Chief Justice (then Circuit Judge) Burger in United States v. Shimon, supra. Here, it was stated, in language that is surely apt here, that:

> "Thus, a defendant may try... to cast doubt on the

probability of his guilt by showing that some in the community believe him to be truthful and honest." 352 F.2d, at 453.

Actually, this is only another way of saying an accused can always prove the existence of the trait of veracity in his character as a method of supporting his credibility.

Again, referring to Lechoco, supra, as was the case there, so it was here--the credibility of the accused and his veracity went to the heart of the question of guilt or innocence. To be sure then, a credibility evaluation was required as between the testimony of Jackson and virtually every crucial prosecution witness. To say, as do the courts below (Jackson, 588 F.2d, at 1055) that Jackson could not be aided by character evidence of this ilk hardly comports with the expressed intent of the Rules.

Moreover, the Circuit Court's apparent reliance on Rule 608 appears to be likewise misplaced. Rule 608 specifically provides:

"(a) Opinion and Reputation Evidence of Character.

The credibility of a witness may be attacked or supported by evidence in the form of reputation or opinion, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence

of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise." (Emphasis added.)

Clearly, the view of the appellate court to the contrary notwithstanding, the Government's cross-examination attacked the credibility and veracity of Jackson (Tr., pp. 840-870). Moreover, the Government specifically attacked Jackson's credibility in its closing argument. Indeed, at one point, the Government argued to the jury that "[T]here is nothing in this case but controversy, and it is the difference between the truth and the untruth" (Tr., p. 947). See, also, United States v. Lechoco, supra.

To the extent the Government succeeded in this effort, it necessarily follows Jackson was denied due process.

III

The Due Process And Fair Trial Rights Of A Defendant Are Offended Where The Prosecutor Elicits Highly Prejudicial Testimony Which Has Absolutely No Probative Value.

The Government elicited from their witness, Beverly Pertilla, that on the night of July 6, 1977, Jackson returned to their hotel room with a small quantity of cocaine. These matters, which had no probative value to the issues framed in

the indictment, were highly prejudicial. In this, the Court of Appeals agreed. Their ultimate view was that it was only harmless error (588 F.2d, at 1056).

Again, in this case, the Government willfully solicited and provoked the original prejudicial response. Obviously inspired by this response, counsel then had the obvious temerity to continue to pursue the line of questioning, thereby eliciting further prejudicial responses. To the extent this evidence connected Jackson with criminal conduct outside the purview of the indictment, such evidence must be viewed as having contributed to the conviction in this case. So much so, that the court below was not warranted in assuming it had no effect on this verdict.

Our view, and the one this Court should credit, once the appellate court recognized, as it did ("that it was improper to introduce evidence of misconduct not charged in the indictment," [584 F.2d, at 1055]), the error assumed an importance in this cause that transcended its own weight. Not only was this evidence, standing alone, improper and perforce prejudicial, when the same is considered along with that bearing on the aborted substantive charges made in the indictment, it is really blinking at Justice to conclude Jackson received all of the due process to which he was entitled.

IV

The Hearsay Rule And The Accused's Right Of Confrontation Can Not Be Circumvented So As To Allow The Parroting Of Statements Attributed To Unidentified, And Unidentifiable, Third Parties.

It is axiomatic that hearsay is an extrajudicial statement testified to by one other than the maker, offered to prove the truth of the matter asserted. See Rule 801(c), Federal Rules of Evidence; United States v. Hicks, 420 F.2d 814 (5th Cir. 1970); and United States v. Johnson, 427 F.2d 957 (5th Cir. 1970).

The evidence to which reference is here being made was hearsay, pure and simple. Its value "rests on the credit of the declarant, who was not under oath nor subject to cross-examination when the statement was made." McCormick, Evidence, §39; United States v. Howard, 449 F.2d 308 (5th Cir. 1971).

Without this evidence, the highly contested[2/] connection between the heroin

2/ Here we are specifically concerned with testimony by Linda Johnson, which showed she had no knowledge of the contents of said bag and, therefore, was unable to relay any such knowledge to Porter or Jackson.

laden bag and the person delivering the same to Linda Johnson would have been even more tenuous. Had this been the case, as it should have been, the requisite criminal knowledge, essential to a finding of guilt, would have been relegated to the mere circumstance of an innocent meeting between Linda Johnson and co-defendant Porter at the Birmingham Airport on July 7, 1977, Moreover, without these "hearsay" statements, the crucial linking of the bag to Porter and through him to Jackson could not have been established (if it ever was) in accordance with fundamental criteria. In Re Winship, 358 U.S. 397 (1970).

The damage done by these statements was further compounded by the fact that the Government could not identify the declarant or otherwise provide petitioner with necessary information to locate this person if she, in fact, existed.

We conceded that under the co-conspiracy exception to the hearsay rule, testimony as to such extrajudicial statements (as those here being discussed) may be admitted if it is established, by evidence other than such hearsay, (1) that the accused (here, Jackson) was involved in a conspiracy with the declarant (in this case the unknown female), and (2) that the statements, if made, were made in furtherance of such conspiracy. Lutwak v. United States, 344 U.S. 604 (1953); Rule 801(d)(2), Federal Rules of Evidence. This rule, however, does not exist as though oblivious to values implicit in the accused's right to be confronted by the witnesses against him.

The fact that the values must be reckoned with in a meaningful way was made most clear in California v. Green, 399 U.S. 419 (1970). Here, this Court noted that more than once "[they had] found a violation of confrontation values even though the statements in issue were admitted under an arguably recognized hearsay exception." Id., at 155.

The question then is how can the Government justify the admission of evidence showing an asserted conversation between a non-conspirator (Linda Johnson) and an unknown person?

At the outset, the Government is stuck with the thrust of their case theory, under which Linda Johnson was not deemed to be a conspirator. This being so, the gap between Jackson and the unknown female can only be bridged if the statements attributed to this unknown person (1) were, in fact, made and (2) were made by a conspirator in furtherance of the charged conspiracy.

Absent here, of course, is any proof this person was a member of any conspiracy--to say nothing of being a member of the charged conspiracy.

A further aspect of our confrontation argument is grounded on Dutton v. Evans, 400 U.S. 74 (1970). Here, this Court noted the mission of the confrontation clause (id., at 89) was to insure that the trier of the facts has a satisfactory basis for evaluating the truth of the prior statement.

The question posed here then turns on answers to (1) whether there was "a satisfactory basis for evaluation" (California v. Green, 399 U.S., at 161); (2) whether cross-examination of the declarant could have possibly exosed the statement, if made, to be unreliable (Dutton v. Evans, at 89); and (3) whether the statements themselves contained a sufficient "indicia of reliability" (ibid). See, Marcus v. Stubbs, 408 U.S. 204, at 213 (1972).

Viewed in the light of the facts in this case, any contention that the assailed evidence passes constitutional muster must surmount the above-indicated queries. This is especially so once we agree, as we must, that statements imputed to the non-testifying declarant were "crucial" to the prosecution and "devastating" to the defense. Dutton v. Evans, supra, at 87.

In dealing with this precise issue, the Fifth Circuit made certain significant determinations. These were set forth in footnote 4 of their Opinion. Because of its extreme and critical importance, that segment of their Opinion is being set forth in its entirety:

> "Miss Johnson testified that she was unaware that the canvas bag she transported from Los Angeles to Birmingham contained heroin, and the prosecutor stated in court that the government considered her to be an innocent participant in the criminal scheme. She testified that she met Porter in Los Angeles in June 1977 and that

he invited her to his family reunion in Birmingham. On July 6 a woman Miss Johnson did not know came by her apartment and gave her $130 air fare to Birmingham. She also handed her a small canvas bag and requested that she pack it with the things she was carrying on her trip. The stranger told Miss Johnson that Porter would pick her up at the Birmingham airport. Appellants contend that the witness' testimony as to what the unidentified woman said when she brought the money and canvas bag to the witness at her Los Angeles apartment violated the hearsay rule and the Confrontation Clause of the Sixth Amendment. We disagree. The Federal Rules of Evidence exclude from the operation of the hearsay rule any oral statement not intended as an assertion. F.Rule Evid. 801(a). Furthermore, an out-of-court statement that is not offered as proof of the matter asserted therein is not hearsay. F.Rule Evid. 801(c). We think that the out-of-court statements fall within that class of "'cases in which the utterance is contemporaneous with a nonverbal act, independently admissible, relating to that act and throwing some light upon it.'" United States v. Annunziato, 293 F.2d 373, 377 (2d Cir. 1961) (quoting Morgan, A Suggested Classification of Utterances Admissible as Res Gestae,

31 Yale L.J. 229, 236 (1922). Since the unidentified woman in Los Angeles was not a witness against the appellants, there was no Confrontation Clause violation in this case." (United States v. Jackson, 588 F.2d, at 1049-1050, fn. 4)

In further amplification of our points in this regard, the Record not only shows the lack of any governmental contention that the Miss Johnson referred to above was a conspirator, it also shows the lack of any contention in the indictment, or elsewhere, that this unidentified person (if she did exist) was a confederate of either of those classified in the indictment as the conspirators. The upshot of this point is that, had such a joint venture been shown, it could possibly have transformed the assailed evidence into an utterance made in furtherance of a conspiracy in which one, or both, of these appellants may have been members.

Also, it is relevant as significant to the Hearsay-Confrontation issues here, that the prosecutor, in arguing on the basis of Linda Johnson's role, distilled her testimony into the following passage:

> "Arthur had come out and talked to me about a family reunion. They gave me the money through somebody I didn't know and a bag and told me to meet James at the airport and give him the stuff. I am sorry, she didn't say give him the stuff. She said take this to Birmingham with you and you will be met by

> James. And James met her at the airport at the designated hour and she said, I gave him my ticket stub. No, she didn't say that at all. She said, he said he would get my bag later, we couldn't get it right now because he was being followed. That is her testimony." (Tr., PP. 449-450 [emphasis added].)

What the argument shows, in our judgment beyond dispute, is that the prosecutor viewed the admission of Linda Johnson's testimony as to what the unidentified woman supposedly had said to her, as substantive proof that these appellants were directly responsible for the actions and words of this unidentified person. Indeed, his argument asks the jury to draw that same conclusion.

But, even this is not all. The importance of this aspect of Linda Johnson's testimony is further heightened by the fact that the jury specifically requested that her recorded testimony (R 978) be replayed for them. This the court permitted. In addition, and even more important, the Record shows the very significant comment by the Judge to the effect that, in his judgment, "[t]here is no question that Miss Johnson's testimony is prejudicial." (Tr., p. 977.) Stated another way, the prosecutor's argument, the jury's request that Linda Johnson's testimony be replayed for them, and the court's candid observation show the evidence being complained about here had a

substantial input on the verdicts returned.

A. Where the dominant purpose of certain statements made by a non-testifying "declarant" is as proof of the matter asserted therein, and such statements are so used by the prosecutor (in his summation) and by the jury (in its deliberations), such statements must be viewed as hearsay within the meaning of Rule 801(c).

It has always been the law that a statement, other than one made by the declarant while testifying, is hearsay if offered to prove the truth of the matter asserted. And, it is a fact that The Federal Rules of Evidence have made certain types of statements, arguably within the usual definitions of hearsay, admissible if they were expressly excluded from its definition (Rule 801[d]) or included within one of its exceptions (Rule 804[b]). Obviously these Rules have liberalized the admission of evidence of a hearsay nature. Still it must be recognized here that a specific exception for "utterances contemporaneous with a nonverbal act, independently admissible, relating to that act and throwing some light upon it" (Jackson, 588 F.2d, at fn.4) was not made one of these exceptions.

In this case then, unless the Fifth Circuit's decision is being misread, the utterance herein being assailed (1) was not intended as an assertion; and (2) was

not offered as proof of the matter asserted therein. As to this matter, the initial question is how can it be said that the statement was either not intended as an assertion, or not offered to prove the truth of the matter asserted therein?

Apart from the argument made elsewhere in this Petition to the effect that where the Government introduces evidence admissible only for a limited purpose, an instruction properly restraining such evidence is required;[3/] the facts here show these statements were offered testimonially--that is, to prove the truth thereof. Diaz v. Southern Drilling Corporation of Argentina, 449 F.2d 258, 261 (5th Cir. 1971).

Here the Record shows, first of all, that the source of the contraband to Linda Johnson was not relevant to any issue in this case. Where, and from whom, Johnson received the contraband and her fare could only be relevant to Jackson's prosecution if Porter was somehow responsible for these items being delivered to her. And, if it was further shown that he (Porter) was acting in complicity with Jackson. But here, the charged conspiracy was that it only involved Jackson and Porter, and was related to the drugs after they had

3/ As to the efficacy of this argument, see, e.g., United States v. Cain, 587 F.2d 677, 680 (5th Cir. 1979) and United States v. Gomez, 529 F.2d 412, 416 (5th Cir. 1976).

been transported by Johnson from California to Alabama.

As postured hereinabove, even the nonverbal act thesis, relied on by the panel (--that is, the giving of the contraband and the money, if it happened, by the stranger to Johnson) was not an act that was itself "independently admissible" (Jackson, at p. 1049, fn.4). But, even this is not all. In our judgment, these utterances, even when viewed as having been contemporaneous with the nonverbal acts we are concerned with here, rather than offering some explanation for them, literally overwhelms such acts.

Be all that as it may, the Circuit Court's reliance on United States v. Annunziato, 293 F.2d 373 (2d Cir. 1961), seems to be sorely misplaced. To begin with, the rule of that case has been routinely criticized (see Vol. 4, Weinstein's, Evidence, §801[c][1], pp. 801-62), and outright rejected in at least one case. (United States v. Mandell, 437 F. Supp. 262, 265-269 [D.C. Md., 1977]).

In addition, the original source for the quote specifically relied on by the panel (31 Yale L.J. 229, 236 [1922]) seemingly has been tortured by them to accommodate this situation. For the one point made clear in the article itself is that utterances of this ilk are, in fact, "offered to prove its truth and [are] obnoxious to the hearsay rule." Id., at 236. On the other hand, even Professor Morgan, the author, expressed the view that because the "witness [here, Linda Johnson] is

subject to cross-examination concerning that event [i.e., the nonverbal act] as well as the fact and content of the utterance,... the extrajudicial statement does not depend solely on the credit of the declarant." Ibid. However, the Professor hastened to add that "[m]uch should be left to the discretion of the trial court." Id., at 237.

As to his criticism of the rule of Annunziato, Weinstein emphasized that situations wherein the utterance is offered to characterize and define nonverbal conduct (--that is, not for its truth, but to show the fact of its expression) "[m]ust be differentiated from the case where [as here] words which clarify an ambiguous situation are relevant only because they are offered for their truth." Weinstein, at pp. 801-61 and 62.

B. The fact that evidence may be admissible as an exception to the hearsay rule does not automatically qualify it for admission; the accused's right of confrontation must also be satisfied.

(1) Where evidence is offered against an accused that cannot be cross-examined, the prosecution must demonstrate such evidence had an independent "indicia of reliability."

The thrust of the petitioner Jackson's argument here is that the jury's consideration of testimony showing

the content of a conversation supposedly had between Linda Johnson and the unidentified female violated both his right of confrontation and the hearsay rule. In making this argument, it should be noted that, as was stated in the plurality opinion in Dutton v. Evans, 400 U.S. 74 (1970), "the mission of the confrontation clause is to advance a practical concern for the accuracy of the truth-determining process in criminal trials by assuring that the trier of the fact [has] a satisfactory basis for evaluating the truth of the prior statement." Id., at 89.

In our judgment, the statements attributed by the witness Linda Johnson to this unknown person contained the implied assertion that Porter was privy, in a criminal sense, to the conversation's basic thrust. Obviously then, the truth of this highly significant implication depends not only on whether the statements were actually made, but on whether the statements (if made) were reliable. This question turns on the answers as to (1) whether there was "a satisfactory basis for evaluating" its truth, California v. Green, 399 U.S. 149, 161 (1970); (2) whether cross-examination could have possibly exposed the statements, if made, to be unreliable, Dutton v. Evans, supra, at 89; and (3) whether the statement itself contained a sufficient "indicia of reliability." Ibid.

It may suffice here simply to say that Jackson, in this case like the defendant in Dutton, was only able to cross-examine the witness, who purportedly was quoting the declarant, on

the factual question as to whether the witness actually heard the particular statements which the Government contended implicated him.

In the context of this case, the confrontation clause assured Jackson (since there was no way he could cross-examine, or otherwise confront, the asserted declarant [i.e., the unknown person]) that he would have a satisfactory substitute for testing the accuracy of the statements imputed to him by a witness testifying in her own self-interest. In this sense, the Government was surely required to demonstrate that this evidence had such an independent "indicia of reliability" that cross-examination would serve no useful purpose.

Indeed, the Fifth Circuit's opinion in United States v. Menichino, 497 F.2d 935 (5th Cir. 1974), seemingly stands for the proposition that "statements admitted under hearsay rules may be examined by the Court to assure the trier of fact [has] a satisfactory basis for evaluating the truth of the prior statement." Id., at 943. And, that same Circuit's opinion in Park v. Huff, 506 F.2d 849 (5th Cir. 1975), can be read as requiring in comparable situations a determination as to whether a sufficient "indicia of reliability" could be gleaned from the utterance itself and the circumstances surrounding it. Also see Marcus v. Stubbs, 408 U.S. 204, 213 (1972).

In making the point that Jackson's confrontation rights were violated, we are not oblivious to this Court's rejection of the argument made in

California v. Green, supra, at pp. 155-156 (1970) that the Sixth Amendment codified common law hearsay principles. Since Jackson could not cross-examine this unknown person as to whether she made the remarks attributed to her, the question then is whether his ability to cross-examine Linda Johnson on the factual question as to whether she actually heard these statements furnished a satisfactory basis for evaluating the underlying truth of the statements themselves.4/ But even this, of course, does not end the matter. The question then becomes whether the circumstances surrounding the specific utterance gave it a sufficient "indicia of reliability" to place it before the jury.

Even this is not all. While it could possibly be inferred that Porter had personal knowledge of the arrangement made with Linda Johnson, no basis exists in this Record for imputing such knowledge to Jackson. Hence, merely having permitted Jackson to cross-examine Linda Johnson cannot be said to have satisfied his confrontation rights.

4/ In dealing with comparable utterances, in the context of a state court prosecution, a panel of the Fifth Circuit, in Park v. Huff, 493 F.2d, at 23, rev'd, 506 F.2d 849 (5th Cir. 1975), noted that a number of possible reasons exist for the insertion of a particular person's name, even by a conspirator, into a crucial conversation. As was true there, such may have been "gratuitous", or it may have been done to add the named person's "prestige to the undertaking."

(2) The admission of an extrajudicial statement imputed by a prosecution witness to a nontestifying declarant, which statement was "crucial" to the prosecution and "devastating" to the defense, constitutes a violation of the right of confrontation.

To begin with, we concede there are exceptions to the hearsay rule. These include the hearsay exception which permits a co-conspirator's extrajudicial, or out-of-court, statements to be admitted when made in furtherance of the conspiracy. See, e.g., Lutwak v. United States, 344 U.S. 604 (1953). On the other hand, the existence even of this rule does not entirely resolve the admissibility of the asserted declarations in this case. Values implicit in the Sixth Amendment right of an accused "to be confronted by the witnesses against him," must perforce be reckoned with. See United States v. Menichino, 497 F.2d 935 (5th Cir. 1974).

In a sense, it can be said that the same considerations that generate the hearsay rule support and animate the right of confrontation. Yet, it seems to be all too clear that this apparent similarity of values does not result in the exclusion of all hearsay that may be violative of the confrontation clause, any more than it makes admissible all testimony that qualifies as an acceptable exception to the hearsay rule.

Of no mean significance is the fact that this Court has explicitly held that:

> "While it may be readily conceded that hearsay rules and the Confrontation Clause are generally designed to protect similar values, it is quite a different thing to suggest that the overlap is complete and that the Confrontation Clause is nothing more or less than a codification of the rules of hearsay and their exceptions as they existed historically at common law. Our decisions have never established such a congruence; indeed, we have more than once found a violation of confrontation values even though the statements in issue were admitted under an arguably recognized hearsay exception." California v. Green, 399 U.S. 149, 155 (1970). (Emphasis added.)

In the absence, then, of an automatic rule of equivalence between the hearsay rule and the right of confrontation, an assessment is required here as to the extent to which the confrontation values may have been violated by the admission of the statements involved here.

Given the fact that the asserted declarant could not be cross-examined, an event which would have at least exposed their demeanor to the scrutiny of the jury, the "mission" of the confrontation clause usually served by

cross-examination could not be accomplished here. Stated another way, the confrontation values of which this Court spoke in California v. Green, supra, could not be served in any manner.

Even here, we concede that a failure to serve confrontation values may not be fatal where the hearsay testimony is neither "crucial" to the prosecution nor "devastating" to the defense. Dutton v. Evans, 400 U.S. 85, 87 (1970).

The evidence admitted against Jackson here, in addition to being both "crucial" and "devastating", was also unreliable. For certainly "[i]t is... [conceivable] that cross-examination could have shown that... [the asserted declarant] was not in a position to know whether or not... [Porter] was involved ...[with the package she was being asked to transport]." Dutton v. Evans, supra, at 88. Nor can the conviction be sure that cross-examination of this person could not have shown (if, in fact, she made the statements attributed to her) that they were made simply to conceal her own role as the sole person involved in an isolated sale. See United States v. Koch, 113 F.2d 982, 983 (2d Cir. 1940); United States v. Zeuli, 137 F.2d 845 (2d Cir. 1941); United States v. Ford, 324 F.2d 950 (7th Cir. 1963). Compare, United States v. Cook, 461 F.2d 906, 910, fn.3 (5th Cir. 1972).

Here too, of the declarations here involved, none were corroborated by other testimony tending to establish the existence of a conspiratorial relationship between Jackson and the declarant.

Indeed, the fact that they were testified to by a witness who had ample cause to falsify is a further consideration in favor of rejection.

Not only this, and perhaps even more important, unlike the situation in Dutton, under the facts here, the out-of-court declaration was not "of peripheral significance at most." Id., at 87. Instead, the witness Johnson's testimony was most crucial to the Government's case.[5/] In any event, the confrontation issue arises here because the jury was invited to infer that the nontestifying declarant had implicitly identified Porter as a confederate when she referred to him in her conversation with the witness Johnson. Id., at 88.

> (3) Where evidence is admitted as substantive proof, and inferentially so regarded by the Government, the jury and the Court; it is "unfair for a reviewing court to consider such evidence for any narrower purpose than that upon which the testimony was unquestionably offered and received at the trial."

The above quote from United States v. Check, 582 F.2d 668, 683 (2d Cir.

5/ In Dutton, the evidence against the defendant consisted not only of eyewitness testimony, but testimony by one of the participants who fully involved Evans in the crime.

1978), seems especially appropriate here. This is particularly so since there can hardly be any dispute that the evidence with which we are here concerned was admitted without any qualifications. See United States v. Brown, 490 F.2d 758, 763 (D.C. Cir. 1973); and United States v. McClain, 400 F.2d 241 (D.C. Cir. 1971).

The appropriateness of this idea can only be augmented by references the Check decision makes to the rather sagacious remarks of Justice Cardozo in Shepard v. United States, 290 U.S. 96, 102-103 (1933). Here it was said, for a unanimous court (in a case that really focuses on an aspect of the evidence spectrum involved in this case) that where testimony was admitted for one purpose, the "trial becomes unfair if [such] testimony thus accepted may be used by an appellate court as though admitted for a different purpose unavowed and unsuspected." Id., at 102-103.

Thus it becomes a point of cardinal significance here, as it was in Shepard, that "[t]he testimony [involved] was neither offered nor received for the strained and narrow purpose now suggested as legitimate." Ibid. Also, see United States v. Hannah, 584 F.2d 27 (3d Cir. 1978), where the Third Circuit, at least when entertaining an appeal by the Government, took the position that:

> "An appellate court may properly review a criminal case on the Government's appeal only on the theory submitted to the jury at trial by the prosecution." Id., at 32.

All this seems to verify the ultimate position taken in Check, by the Second Circuit, and contended for here. Simply put, there "is a venerable precedent for disregarding the unseasonable advancement of... [alternative] purposes to salvage evidence introduced by the Government at a criminal trial when the grounds... advanced in the trial differ markedly from those urged upon the appellate court." United States v. Check, 582 F.2d 668, 681 (2d Cir. 1978).

This case then gives this Court an opportunity to foreclose the use of a Shepard-type, post hoc, justification, or rationale, for admitting evidence. In our judgment, this Court should opt for, and fully credit and endorse, the venerable precedent referred to above as the law of this case.

> (4) Where the prosecution introduces evidence which, if admissible at all, is only proper when used in a highly sophisticated sense and for a very limited, and narrowly circumscribed, purpose; a mandatory duty descended upon the court to inform the jury they did not have the unfettered use of such evidence and that it had to be utilized for the limited purpose only.

The point being urged here is that assuming, without conceding, the utterances, centralized in this application, could have been properly admitted for the purpose indicated by the panel;

the fact still remains there is now showing this is what happened. To be sure, the Record simply shows that counsel's articulated objections were summarily overruled by the trial Judge. (Tr., pp. 386-388.)

In our view, the absence of any instruction confining and restricting the jury's consideration to whatever probative value (if any) these utterances may have had in throwing some light on certain nonverbal acts, perforce, "allowed the jury to draw any inferences [it saw fit] as to the statement's allegations, explicit and implied." United State v. Brown, 490 F.2d 758, 763, fn.10 (D.C. Cir. 1973). Stated another way, the jury was free to consider this evidence without limitation, which includes using it to prove the truth of its content.

The position taken here can be analogized to that very recently expressed by a different panel of Fifth Circuit Judges in United States v. Cain, 387 F.2d 687 (5th Cir. 1979). Here, the court dealt with evidence assertedly offered by the Government, and specifically admitted by the court, on the theory that it fit within a certain exception (Rule 801[1]) to the hearsay rule.

Given Cain, the Fifth Circuit seemingly should have deemed it to be the law of that Circuit that where cogent evidence (if admissible at all) is admissible for a very limited purpose, the danger of the jury misusing such evidence is simply too great to leave the accused unprotected by a sufficient

instruction. Indeed, the position this Court should require them to adopt declares that "as long as we continue to have rules of evidence which admit testimony for some purposes, but not for others,... [trial] courts must guard against its misuse by the jury." United States v. McClain, 440 F.2d 241, 246 (D.C. Cir. 1971).

Since no instruction was given here, it can only follow that Jackson was prejudiced. Hence, the fact that the prosecutor, as well as the Judge, allowed Jackson to be victimized by this evidence shows the need for some definitive expression by this Court as to whether trial courts should recognize as exceptions to the hearsay rule the suggested classifications of Professor Morgan. The fact that the Fifth Circuit seems quite willing to accept one of these suggestions as the basis for affirming this conviction (Jackson, 588 F.2d, fn.4) should cause this Court the type of concern that leads to a hearing on the merits.

V

The Trial Court Erred In Denying The Petitioner's Motion For Judgment Of Acquittal, Made At The Close Of The Government's Case, And Renewed At The Close of All The Evidence And Post-Verdict.

At the outset, it is our view that there is no way a reasonably minded jury should have found the evidence here

was "inconsistent with every reasonable hypothesis of innocence," United States v. Moore, 505 F.2d 620 (5th Cir. 1975). This contention is surely buttressed by the fact that the appeals court determined the possession charge "should not have been submitted to the jury." Jackson, at 1057. And, just as surely, the fact that this contraband was located in an unclaimed suitcase at the airport, even when supported by (1) the statement attributed to the unidentified female--that is, that the suitcase was to be delivered to Jackson's co-defendant; (2) Jackson's shown association with this co-defendant; and, (3) even his conversations had in the hotel room, did not justify this conviction for possession; the same conclusion should be applied to the conspiracy conviction with which he continues to be saddled. Our view, and hopefully this Court's, is that the evidence here bearing exclusively on that charges is insufficient as a matter of law.

Here, of course, it seems clear the conspiracy charge is substantiated on the fact that Jackson was arrested with Porter, who was identified as the person to whom the suitcase was to be delivered. Hence, it would only be an assumption, even if the suitcase had been delivered to Porter, that Jackson not only was aware of its contents, but had a sufficient stake therein to make him a conspirator either with Porter, or a co-conspirator of the unknown female in California.

On the basis of the evidence presented here, it seems clear beyond dispute that, at best, the case against

Jackson was tenuous. Hence, any conclusion that this evidence was sufficient seems most unreasonable.

Accordingly, this Court ought to review Petitioner's conviction for this reason, as well as for the other reasons set forth in this Petition.

CONCLUSION

A careful reading of the various arguments made in this Petition should convince this Court, both as to the gross injustice suffered by this Petitioner (in the district court and by the appeals court) and the substantiality of the constitutional questions and issues presented. For these reasons, this Court should grant the writ of certiorari and accept this case for review.

Respectfully submitted,

JAMES R. WILLIS, ESQ.
Attorney for Petitioner
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Cleveland, OH 44114
216/523-1100

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY THAT ON THIS DATE, APRIL 5, 1979 THE FOLLOWING OPPOSING COUNSEL HAVE BEEN SERVED VIA EXPRESS MAIL, WITH COPIES OF THE FOREGOING PETITION FOR A WRIT OF CERTIORARI.

J.R. BROOKS, UNITED STATES ATTORNEY
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HONORABLE WADE MCCREE
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UNITED STATES DEPARTMENT OF JUSTICE
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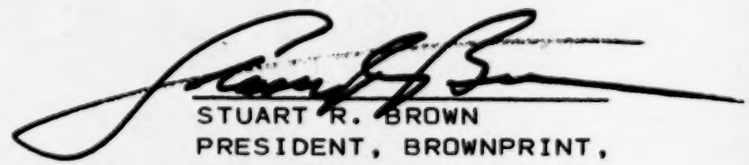
(ATTY FOR ARTHUR PORTER, III)



STUART R. BROWN
PRESIDENT, BROWNPRINT, INC.

APPENDIX

United States Court of Appeals
Fifth Circuit
Office of the Clerk

March 7, 1979

TO ALL PARTIES LISTED BELOW:

NO. 77-5707-UNITED STATES OF AMERICA V. EARNEST JACKSON, JR., JAMES ARTHUR PORTER, III

Dear Counsel:

This is to advise that an order has this day been entered denying the petition( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the petition ( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH, Clerk

By /s/ Sally Hayward
Deputy Clerk

cc: James R. Willis
Dennis E. Siegal
Murray Silver
J. R. Brooks
Bill Barnett

APPENDIX "A"

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

EARNEST JACKSON, JR., AND JAMES ARTHUR PORTER, III,
Defendants-Appellants

No. 77-5707

United States Court of Appeals,
Fifth Circuit

Feb. 2, 1979.

Appeal from the United States District Court for the Northern District of Alabama.

Before MORGAN, RONEY and VANCE, Circuit Judges.

LEWIS R. MORGAN, Circuit Judge:

Following a jury trial in the United States District Court for the Northern District of Alabama, appellants Earnest Jackson, Jr., and James Arthur Porter, III, were convicted under a two-count indictment of violating the federal narcotics laws. Count One charged appellants with conspiracy to distribute approximately 934.5 grams of heroin, a Schedule I controlled substance, in violation of 21 U.S.C. § 846. Count Two charged appellants with possession of heroin with intent to distribute in violation of 21 U.S.C. §841(a)(1).[1] In their principal argument appellants

APPENDIX "B"

contend that their Fourth Amendment privacy rights were violated when narcotics agents rented an adjacent motel room and eavesdropped on conversations in Jackson's room by placing their ears next to the space at the bottom of the door connecting the two rooms. Both appellants also alleged that none of the evidence admitted at trial established their possession of the heroin. Jackson further asserts a number of additional errors requiring reversal which we describe and discuss below. We affirm as to appellants' conspiracy conviction but reverse as to their conviction for possession with intent to distribute.

I. FACTS

For several years prior to Jackson's arrest, agents of the Drug Enforcement Administration had suspected him of narcotics laws violations. Despite their suspicions and a three-year investigation involving periodic surveillance of his conduct and activities, DEA agents had never observed Jackson passing heroin nor uncovered any hard evidence that he was trafficking in narcotics. On July 4, 1977, Jackson and a Miss Beverly Pertilla checked into room 312 of the Kahler Plaza Hotel in Birmingham, Alabama. An off-duty Birmingham police officer working security at the hotel spotted Jackson on July 5 and notified the DEA of his presence. On July 6 Agent Hahn of the DEA and Sergeant Trucks of the Birmingham Police Department rented room 314 at the hotel for the purpose of monitoring Jackson's activities.[2] Rooms 312 and 314 adjoin and are connected by a set of double doors. After entering room 314 the officers determined that they could

hear conversations in room 312 by lying on the motel room floor and pressing their ears to the 3/4" crack at the bottom of their connecting doors.[3] Although at times their aural surveillance was impeded by the sounds of the television, plumbing, and air conditioning in room 312, the officers had no difficulty in overhearing much of the conversation in the adjoining room. At no time did the officers use any electronic or mechanical device to assist them in their aural surveillance.

Utilizing this eavesdropping technique, the officers on July 6 overheard Jackson make two telephone calls to Buffalo, New York. During these calls Jackson stated, "No, I haven't been able to contact my man yet. [Pause.] It is like gold." and "The stuff is coming from L.A. [Pause.] No problem with my man." On the morning of July 7 Jackson told his room guest, Beverly Pertilla, to call an airline and make flight reservations to Buffalo, New York. Sgt. Trucks immediately dispatched two undercover officers to the airport to set up surveillance. Shortly after Pertilla made the reservations, Jackson received a brief telephone call. He then cursed, seemed excited for several minutes, and told Pertilla that "the stuff may be in trouble" and "the stuff is worth $40,000." Within twenty minutes Jackson received another telephone call in which he stated, "is the stuff all right? Is the suitcase still at the airport?" Following this conversation Jackson told Pertilla, "I don't know what went wrong. The police followed him to the airport. The suitcase is still at the airport.

The flight came in at 9:08 and I don't know what went wrong."

[1-3] Upon arriving at the airport, the undercover officers parked their unmarked car behind a car driven by appellant Porter. Porter immediately drove away from the terminal building, passed back through the area three minutes later, disappeared for approximately fifteen minutes, and finally departed the airport with Linda Johnson who had arrived at 9:08 a.m. on a flight from Los Angeles, California[4]. Miss Johnson did not pick up her luggage before leaving with Porter. Porter drove Linda Johnson to the Kahler Plaza Hotel, escorted her to her room, and then paid a visit to room 312. Jackson asked Porter, "Is everything all right? Is the suitcase still at the airport? Good, let's go."

By the time Jackson and Porter arrived at the airport, Linda Johnson's unclaimed suitcase had been placed in the Delta Airlines baggage claims office. The suitcase which was the only piece of unclaimed luggage, was sitting near a window where it was clearly visible to passersby. Jackson walked around inside the terminal and, at one point, paused in front of the baggage claims office. Porter, who was carrying a piece of luggage, entered the baggage claims office, looked for a moment in the direction of the unclaimed suitcase, and left the office. He then walked to a United Airlines desk where he purchased a ticket and checked his luggage. Jackson and Porter left the terminal, got into a car, and were arrested as they attempted to leave the airport.

Based on the information obtained as a resulted of the eavesdropping, DEA agents obtained search warrants on both the Johnson suitcase and room 312 at the hotel. Inside the suitcase was a zippered canvas bag which contained approximately two pounds of 8% heroin and approximately one pound of a substance used as a diluter. The heroin had a wholesale value of approximately $40,000 and a street value approaching $1,000,000. The search of room 312 at the hotel revealed a tote bag which contained $42,000 in forty-two $1,000 bundles.

II. FOURTH AMENDMENT CONSIDERATIONS[5]

[4,5] The Fourth Amendmnt prohibits "unreasonable searches and seizures" and assures "the right of the people to be secure in their persons, houses, papers, and effects." The protections afforded by this amendment provide individuals with a right of privacy which must not be arbitrarily invaded by either the federal government or the states. Wolf v. Colorado, 338 U.S. 25, 69 S.Ct. 1359, 93 L.Ed. 1782 (1949); Boyd v. United States, 116 U.S. 616, 6 S.Ct. 524, 29 L.Ed. 746 (1886). This court has repeatedly stressed the concept that "the underlying purpose of the Fourth Amendment is to protect and shield citizens from unwarranted intrusions into their private domain." United States v. Davis, 423 F.2d 974, 977 (5th Cir. 1970). See Texas v. Gonzales, 388 F.2d 145 (5th Cir. 1968). Any evidence secured through an illegal search and seizure may not be used in a federal prosecution, Weeks v. United States, 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652 (1914), nor may the fruit

of such tainted evidence be admitted against the defendant whose privacy rights were originally violated. Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963); United States v. Cruz, 581 F.2d 535 (5th Cir. 1978).

The scope of the Fourth Amendment's protection of personal privacy is delineated in Katz v. United States, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). See Rakas v. Illinois, ___ U.S. ___, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978) (No. 77-5781). In Katz the Supreme Court held that eavesdropping on conversations in a telephone booth by means of an electronic listening devise attached to the top of the booth constitutes a Fourth Amendment search and seizure.[6] In finding an illegal search despite the absence of a physical intrusion into the phone booth, the Court rejected the trespass doctrine applied in previous cases and held that an individual is entitled to Fourth Amendment protection whenever he has a "reasonable expectation of privacy." The Court stated that the parties' disagreement over whether a telephone booth is a constitutionally protected area

> deflects attention from the problem presented by this case. For the Fourth Amendment protects people, not places. What a person knowingly exposes to the public even in his own home or office, is not a subject of Fourth Amendment protection.... But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.

389 U.S. at 351-52, 88 S.Ct. at 511 (citations omitted). We must decide if the agents' aural surveillance of Jackson's room amounted to an illegal search under the principles enunciated in Katz.

This court has had previous occasion to address the constitutional issues presented on the facts of this appeal. In Jones v. United States, 339 F.2d 419 (5th Cir. 1964), narcotics agents entered a motel room adjoining appellants' room and removed a control panel from a heating unit built into the common wall dividing the two rooms. With the panel removed the agents were able to see and hear incriminating activity in appellants' room. The court concluded that in the absence of a physical intrusion into the premises occupied by appellants, the agents' surveillance did not amount to a search and seizure in violation of the Fourth Amendment. Because Jones applied the trespass analysis rejected in Katz and did not approach the issue in terms of the reasonableness of appellants' expectation of privacy, that decision has no precedential value for this court.

[6,7] Employing the privacy interest analysis approved in Katz, we hold that these appellants had not justifiable expectations of privacy with respect to their motel room conversations which were audible to the unaided ears of the government agents lawfully occupying an adjoining room. "It has long been settled that objects falling in the plain view of an officer who has a right to be in the position to have that view are subject to seizure and may be introduced into evidence." Harris v. United States,

390 U.S. 234, 236, 88 S.Ct. 992, 993, 19 L.Ed.2d 1067 (1968) (per curiam). The plain view doctrine defines certain sensory observations as being outside the scope of the Fourth Amendment's protections. This doctrine is entirely consistent with the Katz expectations standard since an individual can have no justifiable expectation of privacy as to activities he exposes to the plain view of others. Katz, supra, at 351, 88 S.Ct. 507.[8] We think that conversations in a motel room which are audible to one in an adjoining room constitute words exposed to the "plain view" of others.

[8-10] In assessing the reasonableness of appellants' privacy expectations, we are mindful that the concept of the sanctity and inviolability of the home stands at the very core of the protections afforded by the Fourth Amendment. Silverman v. United States, 365 U.S. 505, 511, 81 S.Ct. 679, 5 L.Ed.2d 734 (1961); Boyd v. United States, 116 U.S. 616, 630, 6 S.Ct. 524, 29 .Ed. 746 (1886); Fixel v. Wainwright, 492 F.2d 480 (5th Cir. 1974); United States v. Davis, 423 F.2d 974, 977 (5th Cir. 1970).[9] We also recognize that "[a] hotel room can clearly be the object of Fourth Amendment protection as much as a home or an office." Hoffa v. United States, 385 U.S. 293, 301, 87 S.Ct. 408, 413, 17 L.Ed.2d 374 (1966); Stoner v. California, 376 U.S. 483, 490 84 S.Ct. 889, 11 L.Ed.2d 856 (1964); Lanza v. New York, 370 U.S. 139, 82 S.Ct. 1218, 8 L.Ed.2d 384 (1962). But despite the fact that an individuals' Fourth Amendment rights do not evaporate when he rents a motel room, the extent of the privacy he is entitled to reasonably

expect may very well diminish. For although a motel rooms shares many of the attributes of privacy of a home, it also possesses many features which distinguish it from a private residence:

> A private home is quite different from a place of business or a motel cabin. A home owner or tenant has the exclusive enjoyment of his home, his garage, his barn or other buildings, and also the area under his home. But a transient occupant of a motel must share corridors, sidewalks, yards, and trees with the other occupants. Granted that a tenant has a standing to protect the room he occupies, there is nevertheless an element of public or shared property in motel surroundings that is entirely lacking in the enjoyment of one's home.

Marullo v. United States, 328 F.2d 361, 363 (5th Cir. 1964). No matter where an individual is, whether in his home, a motel room, or a public park, he is entitled to a "reasonable" expectation of privacy. Katz, supra, 389 U.S. at 359, 88 S.Ct. 507; United States v. Holmes, supra, 521 F.2d at 864. However, what is reasonable in one setting may be unreasonable in another, and assessing the reasonableness of an individual's privacy expectations in terms of "place" does not offend the standard articulated in Katz. "As the Court's opinion states, 'the Fourth Amendment protects people, not places.' The question, however, is what protection it affords to those people. Generally, as here, the answer to that question requires reference to a 'place.'" Katz, supra at 361, 88 S.Ct.

at 516 (Harlan, J., concurring). In view of the open, public, and shared atmosphere of a motel, the nearness of one's neighbors, and the prevalence of uninvited listeners in human society, we hold that a motel room occupant assumes the risk of an eavesdropper[10] when he carries on his conversations in a tone of voice audible to one outside the room.

Our holding in this case is clearly supported by this court's decisions in Gil v. Beto, 440 F.2d 666 (5th Cir. 1971) and United States v. Williams, 581 F.2d 451 (5th Cir. 1978). In Gil police officers began their surveillance of appellant by obtaining permission to occupy a motel cabin adjoining appellant's cabin. One of the officers was able to see into the appellant's cabin by standing on a walkway alongside the cabin and peering through some partially opened venetian blinds. While maintaining a vigil at this window, he observed narcotics paraphernalia and drug-related activity. In response to appellant's argument that he was the victim of an unreasonable search, this court held that "[n]o Fourth Amendment rights are violated when police officers are lawfully on the premises and merely observe what is in plain view." Id., at 667. See United States v. Shima, 545 F.2d 1026 (5th Cir. 1977). We see no difference between engaging in nonelectronic aural surveillance of appellant's motel room and keeping a vigil at his window and maintaining visual surveillance of his activities. Neither act is genteel, but neither act is unconstitutional.[11]

In Williams federal agents, acting on a tip that a still was located on cer-

tain farm property, crept through a wooded area and across a clearing until they approached the outbuildings of the farmstead. From this position the agents detected the odor of moonshine liquor and, equipped with this information, procured a search warrant for the property. Applying the recognized distinction between open fields and curtilage as a useful gauge in measuring the reasonableness of appellant's privacy expectations, this court held that the agents' furtive trespass did not constitute a Fourth Amendment violation.[12] We think that this case is consistent with the result we reach today.

[11-14] We emphasize that a government agent may legally engage in aural surveillance only when he listens from a place where he has a legal right to be. See Harris v. United States, supra. Although this court has abandoned the use of property concepts to define the scope of the Fourth Amendment, we have not hesitated to find an illegal search where the government agent trespasses in order to secure his plain view. United States v. Davis, 423 F.2d 974 (5th Cir. 1970); Texas v. Gonzales, 388 F.2d 145 (5th Cir. 1968); Brock v. United States, 223 F.2d 681 (5th Cir. 1961). Whenever government agents enter into the curtilage they necessarily intrude upon the individual's reasonable expectation of privacy. United States v. Williams, 581 F.2d 451 (5th Cir. 1978). These cases suggest that property concepts, though no longer a Fourth Amendment yardstick, do retain some vitality under the Katz analysis. See Rakas v. Illinois, supra ___ U.S. at ___ n.12,

99 S.Ct. 430 n.12; Note, 76 Mich.L.Rev. 154, 171-75 (1977). We reiterate, however, that privacy remains the proper focus and that under a privacy analysis there is no requirement that the government engage in a physical trespass before the individual can invoke Fourth Amendment protection. Thus, the fact that the agents in this case were lawful occupants of the motel room from which they listened and did not physically trespass into appellants' room, though significant, is not controlling.[13] We conclude that the location of the government surveillant vis-a-vis the individual surveiled is merely a factor to be considered in assessing the justifiability of the individual's privacy expectations. On these facts, however, we find that the appellants assumed the risk of being overheard by an eavesdropper and therefore had no justifiable expectation of privacy as to their criminal conversations.

[15] Our holding today is also consistent with cases decided by other circuits on virtually the same facts. In United States v. Fisch, 474 F.2d 1071 (9th Cir.), cert. denied, 412 U.S. 921, 93 S.Ct 2472, 37 L.Ed.2d 148 (1973), as in this case, police officers rented a room in the motel where appellants were staying and surreptitiously listened to appellants' conversations by placing their ears next to a crack at the bottom of the door connecting the two rooms. Utilizing the Katz expectations standard, the Ninth Circuit concluded that appellants had not justifiably relied on the privacy of their conversations which, in essence, the court likened to items

exposed to the "plain view" of others. We agree with the court's reasoning and with its conclusion that no illegal search occurred when the officers were forced to listen more closely by placing their ears next to the door:

> Appellants would have us divide the listening room into privileged or burdened areas, and the conversations into degrees of audibility to, we presume, the normal ear, thus a remark heard on the bed arguably admissible, but not those heard at the door, a loud remark admissible, arguably one uttered in "normal" tones, but definitely not one whispered. We find no precedent for a categorization involving such hair-splitting distinctions and we are not disposed to create one.

United States v. Fisch, supra at 1077.[14] In United States v. Llanes, 398 F.2d 880 (2nd Cir. 1968), the court refused to find a Fourth Amendment violation where a narcotics agent stationed himself in a hallway near an apartment door and eavesdropped on appellants' conversations inside the apartment. "We believe that conversations carried on in a tone of voice quite audible to a person standing outside the home are conversations knowingly exposed to the public." Id. at 884.[15] See United States v. Ortega,, 471 F.2d 1350 (2nd Cir. 1972), cert. denied, 411 U.S. 948, 93 S.Ct. 1924, 36 L.Ed.2d 409 (1973). These cases support our position that nonelectronic eavesdropping from an adjoining motel room does not constitute a Fourth Amendment violation.

III. CHARACTER EVIDENCE

[16] In a second argument Jackson contends that he should have been allowed to introduce testimony supporting his reputation for "truth and veracity." The trial court excluded this evidence on the ground that Jackson]s reputation for truth and veracity was not pertinent to the crime with which he was charged. The rule regarding the admissibility of character evidence to prove conduct is stated in Rule 404(a)(1) of the Federal Rules of Evidence:

> Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except:
>
> (1) Evidence of a pertinent trait of his character offered by an accused, or by the prosecution to rebut the same.

In asserting that "an accused can always prove the existence of the trait of veracity in his character as a method of supporting his credibility," Jackson assumes that a defendant's credibility is in issue in any criminal prosecution. However, not all criminal indictments impugn the defendant's truthfulness and veracity. Since evidence of the trait of truthfulness is not pertinent to the criminal charges of conspiracy to distribute heroin or possession of heroin, Rule 404 forbids its introduction as circumstantial evidence of innocence of those crime.

[17] Furthermore, when Jackson elected to take the stand at his trial he did not automatically acquire the right to bolster his credibility. Where an accused takes the stand as a witness he places his credibility in issue as does any other witness. If the prosecution chooses to attack his credibility, he may then introduce evidence of his good character for truthfulness and veracity:

> The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

Fed.R.Evid. 608 (emphasis added). We find no evidence of an attack upon Jackson's character for truthfulness. During the cross-examination the government attorney questioned Jackson closely about his version of the facts and pointed out conflicts between that testimony and the testimony of other witnesses. However, "[]the mere fact that a witness is contradicted by other evidence in the case does not constitute an attack upon his reputation for truth and veracity." Kauz v. United States, 188 F.2d 9, 10 (5th Cir. 1951). See Homan v. United States, 279 F.2d 767, 772 (8th Cir. 1960). The district court did not err in excluding the proffered evidence.

IV. EVIDENCE OF MISCONDUCT NOT CHARGED IN THE INDICTMENT

[18-20] Jackson further contends that he was entitled to a mistrial when the government elicited testimony from a prosecution witness concerning appellant's use of cocaine, thus connecting him with criminal conduct outside the scope of the indictment.[16] It is generally improper to introduce evidence of misconduct not charged in the indictment. See Michelson v. United States, 335 U.S. 469, 69 S.Ct. 213, 93 L.Ed.168 (1948); United States v. Beechum, 555 F.2d 487, vacated on other grounds, 582 F.2d 898 (5th Cir. 1978). This general rule of exclusion is set forth in Fed.R.Evid. 404(b):

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparations, plan, knowledge, identity, or absence of mistake or accident.

Since none of the recognized exceptions to the rule are applicable in this case, Rule 404(b) precluded the government from introducing evidence of appellant's other criminal acts to establish his propensity to commit the crimes charged in the indictment. When the witness mentioned appellant's possession of cocaine, the government attorney should have changed the subject and should not have asked her if she was "sure it was

cocaine." We are of the opinion, however, that the appellant was not prejudiced by the witness' testimony. The record reveals that the properly admitted evidence against appellant as to the conspiracy charge was so overwhelming that the introduction of the inadmissible evidence was harmless beyond a reasonable doubt. United States v. Warren, 578 F.2d 1058, 1064 (5th Cir. 1978) (en banc); United States v. Bokire, 523 F.2d 767, 769 n.2 (5th Cir. 1975). "An error that might be prejudicial in a close case does not require reversal when evidence of the defendant's guilt is strong." United States v. Roland, 449 F.2d 1281 (5th Cir. 1971); United States v. Lipscomb, 435 F.2d 795 (5th Cir. 1970). The fact that curative instructions were not given to the jury to disregard the evidence does not require a mistrial. United States v. Resnick, 488 F.2d 1165 (5th Cir. 1974), cert. denied, 416 U.S. 991, 94 S.Ct. 2400, 40 L.Ed.2d 769 (1974).

V. SUFFICIENCY OF THE EVIDENCE TO PROVE POSSESSION

[21] Both Jackson and Porter challenge their convictions under Count Two of the indictment charging them with possession of heroin with intent to distribute. The government bears the burden of proving the elements of this offense beyond a reasonable doubt. In testing the sufficiency of the evidence[17] in this circumstantial evidence case, the trial judge was required to determine before submitting the case to the jury whether a reasonably minded jury must necessarily entertain a reasonable doubt

as to appellant's guilt. United States v. Haggins, 545 F.2d 1009 (5th Cir. 1977). Examining the case in the light most favorable to the government, we agree with appellants that, as a matter of law, there was insufficient evidence of their guilt of the substantive offense to submit this charge to the jury.

[22-24] The government introduced no evidence of appellants' actual possession of the heroin. Proof of actual possession is not necessary to sustain appellants' conviction, however, since constructive possession of a "controlled substance" violates 21 U.S.C. § 841(a). United States v. Garza, 531 F.2d 309 (5th Cir. 1976). Constructive possession need not be exclusive but may be shared by others, and such possession may be established by circumstantial as well as by direct evidence, Garza v. United States, 385 F.2d 899 (5th Cir. 1967), but neither presence in the area where the narcotic is discovered nor association with the person who does control the drug is sufficient to prove possession. United States v. Stephenson, 474 F.2d 1353 (5th Cir. 1973). To establish constructive possession the government had to prove appellants' dominion and control over the drug. Garza v. United States, supra; United States v. Mendoza, 433 F.2d 891 (5th Cir. 1976). Acknowledging the ambiguity of the word "possession" and mindful that a charge of constructive possession should be viewed critically and approached with some caution, United States v. Phillips, 496 F.2d 1395, 1397 (5th Cir. 1974), cert. denied, 422 U.S. 1056, 95 S.Ct. 2680, 45 L.Ed.2d 709 (1975), we are unable to find any evidence in the

record establishing appellants' dominion and control over the heroin. The conversations overheard by the narcotics agents suggested criminal activity and indicated that a conspiracy was afoot. Although several of these conversations made reference to an impending shipment from Los Angeles and to a suitcase at the airport; they are alone insufficient to prove appellants' possession of the contraband. The heroin was at all times located in Miss Johnson's unclaimed suitcase at the airport. Miss Johnson was not indicted as a coconspirator nor did the government suspect her of any wrongdoing. She testified that she never gave Porter the claim check for her luggage. Although appellants' perambulations at the airport took them very near the suitcase, at no point did either appellant attempt to claim the luggage from the airlines officials. Moreover, when Porter and Jackson were arrested at the airport no claim check was found on either appellant and, as one of the agents testified, without the claim check the airline baggage officials would not release the baggage. Considering all of the circumstances, we think that a reasonably minded jury could not have found that the evidence excluded every reasonable hypothesis of appellant's innocence of the crime of possession. Consequently, this part of the government's case should not have been submitted to the jury.

AFFIRMED in part and REVERSED in part.

(588 F.2d 1046 [Feb. 2. 1979])

FOOTNOTES TO OPINION

1. Appellants received twelve year sentences with a special parole period of fifteen years under Count One and fifteen year sentences with a special parole of fifteen years under Count Two. Jackson was fined $15,000 on Count One and $25,000 on Count Two; Porter was fined $10,000 on both counts. Appellants' sentences under the two counts run consecutively.

2. Sgt. Trucks testified that the officers did not rent the adjacent motel room for the express purpose of listening to Jackson's conversations and that prior to entering room 314 they had no idea that they could overhear what was said in room 312. The outcome of this case would not be affected even had officers anticipated eavesdropping on Jackson's conversations.

3. In order to avoid detection, the officers did not open the connecting door in their room so that they might better hear what was said in the adjoining room.

4. Miss Johnson testified that she was unaware that the canvas bag she transported from Los Angeles to Birmingham contained heroin, and the prosecutor stated in court that the government considered her to be an innocent participant in the criminal scheme. She testified that she met Porter in Los Angeles in June 1977 and that he invited her to his family reunion in Birmingham. On July 6 a woman Miss Johnson did not know came by her apartment and gave her $130 as air fare to Birmingham. She also

handed her a small canvas bag and requested that she pack it with the things she was carrying on her trip. The stranger told Miss Johnson that Porter would pick her up at the Birmingham airport. Appellants contend that the witness' testimony as to what the unidentified woman said when she brought the money and canvas bag to the witness at her Los Angeles apartment violated the hearsay rule and the Confrontation Clause of the Sixth Amendment. We disagree. The Federal Rules of Evidence exclude from the operation of the hearsay rule any oral statement not intended as an assertion. F.Rule Evid. 801(a)--Furthermore, an out-of-court statement that is not offered as proof of the matter asserted therein is not hearsay. F.Rule Evid. 801(c). We think that the out-of-court statements fall within that class of "'cases in which the utterance is contemporaneous with a nonverbal act, independently admissible, relating to that act and throwing some light upon it.'" United States v. Annunziato, 293 F.2d 373, 377 (2d Cir. 1961) (quoting Morgan, A Suggested Classification of Utterances Admissible as Res Gestae, 31 Yale L.J. 229, 236 (1922). Since the unidentified woman in Los Angeles was not a witness against the appellants, there was no Confrontation Clause violation in this case.

5. Since we find no Fourth Amendment violation in this case, we need not address the question of Porter's "standing" to challenge the legality of the agents' surveillance of conversations between Jackson and Beverly Pertilla. We note, however, that the Supreme Court in the recent case Rakas v.

Illinois, ___ U.S. ___, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978), disapproved of the use of "standing" analysis in the Fourth Amendment context and favored an approach that focuses on a particular defendant's rights under substantive Fourth Amendment law.

6. Katz was not the first case to hold that conversations can be the object of a Fourth Amendment "search and seizure." See Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963); Silverman v. United States, 365 U.S. 505, 81 S.Ct. 679, 5 L.Ed.2d 734 (1961).

7. Although Katz is generally understood as enunciating a "reasonable expectation of privacy" standard, this language is actually taken from Justice Harlan's concurring opinion. 389 U.S. at 360, 88 S.Ct. 507. He explained this standard as follows: "[T]here is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'" 389 U.S. at 361, 88 S.Ct. at 516. The majority employed similar language when it held that the government's eavesdropping activities "violated the privacy upon which [petitioner] justifiably relied...." 389 U.S. at 353, 88 S.Ct. at 512. The Court in United States v. White, 401 U.S. 745, 752, 91 S.Ct. 1122, 29 L.Ed.2d 453 (1971), also speaks in terms of a "justifiable expectation of privacy." In its most recent pronouncement, the Court interprets Katz as articulating a "legitimate expectation of privacy" standard. Rakas v. Illinois,

supra, ___U.S. at ___, 99 S.Ct. at 430. In a footnote the Court provides some guidance as to the meaning of "legitimate":

> "[A] 'legitimate' expectation of privacy by definition means more than a subjective expectation of not being discovered. A burglar plying his trade in a summer cabin during the off season may have a thoroughly justified subjective expectation of privacy, but it is not one which the law recognizes as 'legitimate.' His presence, in the words of [Jones v. United States, 362 U.S. 257, 267 , [80 S.Ct. 725, 4 L.Ed.2d 576] (Harlan, J., concurring)."

Rakas v. Illinois, supra, ___ U.S. at ___n.12, 99 S.Ct. at 430 n.12.

Whenever we use the phrase "reasonable expectation of privacy" in this opinion, we man to incorporate the concepts of "justifiability" and "legitimacy." See generally Note, 76 Mich. L.Rev. 154, 168 n.64 (1977).

8. "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." 389 U.S. at 351, 88 S.Ct. at 511.

9. "A person's home holds a favored position in the list of those areas which are protected from unreasonable searches and seizures." United States v. Davis, supra at 977.

10. "The risk of being overheard by an eavesdropper or betrayed by an informer

or deceived as to the identity of one with whom one deals is probably inherent in the conditions of human society. It is the kind of risk we assume whenever we speak." Hoffa v. United States, 385 U.S. 293, 303, 87 S.Ct. 408, 17 L.Ed.2d 374 (1966), quoting Lopez v. United States, 373 U.S. 427, 465, 83 S.Ct. 1381, 1402, 10 L.Ed.2d 462 (1963) (Brennan, J., dissenting).

11. "Not every breach of etiquette poses a constitutional issue." United States v. Sedillo, 496 F.2d 151, 152 (9th Cir. 1974). See United States v. Williams, 581 F.2d 451, 454 (5th Cir. 1978); United States v. Fisch, 474 F.2d 1071, 1077 (9th Cir.), cert. denied, 412 U.S. 921, 93 S.Ct. 2742, 37 L.Ed.2d 148 (1973); Anspach v. United States, 305 F.2d 48 (10th Cir.), cert. denied 371 U.S. 826, 83 S.Ct. 46, 9 L.Ed.2d 65 (1962).

12. We do not read Williams as requiring a perfunctory application of the open fields--curtilage distinction. Rather, we think that the place from which the agents receive their sensory impressions is merely a factor to be considered in evaluating the reasonableness of privacy expectations. See United States ex rel. Gedko v. Heer, 406 F.Supp. 609 (W.D.Wis. 1975). Williams does not foreclose the possibility that this court may, under different facts, find a Fourth Amendment violation even though the government agents make their observations from an "open field."

13. We note that under the Katz expectations test it would be possible for a police officer, using only his natural

senses, to commit an illegal search and seizure without engaging in a physical trespass. See United States v. Case, 435 F.2d 766 (7th Cir. 1970). The Court in Katz did not restrict its holding that a nontrespassory surveillance could violate the Fourth Amendment to electronic eavesdropping cases. We therefore reject as overly broad the government's proposed rule that any information obtained by an officer using his natural senses from a place where he has a legal right to be is admissible evidence. Cases may arise in which a police officers, though legally in the place from whence he makes his observations, nevertheless infringes on the privacy upon which an individual justifiably relied.

14. Appellant's attempts to distinguish Fisch are unpersuasive. Jackson asserts that the court's conclusion that there was no justifiable reliance on privacy is bottomed on the fact that one critical conversation was audible to an officer while in the middle of his room. As the language quoted in text indicates, however, the Fisch court declined to "divide the listening room into privileged or burdened areas." See United States v. Martinez-Miramontes, 494 F.2d 808, 810 (9th Cir. 1974). Porter distinguishes Fisch by pointing out that the officers in that case had a high degree of probable cause is immaterial. "Searches conducted without warrants have been held unlawful 'notwithstanding facts unquestionably showing probable cause.'" Katz, supra 389 U.S. at 357; United States v. Shima, 545 F.2d 1026 (5th Cir. 1977).

15. Although the court's opinion does not detail the precise position from which the agent intercepted the conversations, he apparently had no need to put his ear to the apartment door as the occupants "were speaking so loudly that their voices were clearly audible in the hallway." United States v. Llanes, supra at 882. However, we do not think that placing an ear next to the door converts otherwise permissible surveillance into an illegal search.

16. The following exchange took place during the government's questioning of Beverly Pertilla:

Q What, if you recall, did Mr. Jackson bring with him, if anything, when he came back to the room?

A A pizza pie and a Sprite.

Q Anything else?

A And I think he had a small amount of cocaine, but I am not positive that is what it was.

Q When arrived back, what did you do? Had the pizza been opened.?

A No, we ate it. I had a small piece because I had eaten dinner already. And he ate the pizza.

Q Are you sure it was a Sprite?

A Well, I don't know whether I had any or not.

Q You sure it was cocaine?

A Perhaps.

17. Appellants also contend that the evidence was insufficient to support a conviction on the conspiracy count. Taking the evidence in the light most favorable to the government, Glasser v. United States, 315 U.S. 60, 80, 62 S.Ct. 457, 86 L.Ed. 680 (1942), we hold that reasonable jurors could find the evidence inconsistent with every hypothesis of innocence. United States v. Moore, 505 F.2d 620, 623 (5th Cir. 1974), cert. denied, 421 U.S. 918, 95 S.Ct. 1581, 43 L.Ed.2d 785 (1975). The record reveals ample evidence to support appellants' conspiracy convictions.